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In the Supreme Court of the United States

OCTOBER TERM, 1962

MANUEL SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

ROBERT J. KOCZAK, JR.,
Assistant Attorney General,

[illegible],
JULIA P. COOPER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. i-xiii) is reported at 311 F. 2d 327.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1962 (Pet. App. xiv). A petition for rehearing was denied on February 13, 1963 (Pet. 2). On March 4, 1963, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari

to and including April 13, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly denied petitioner's motion for a continuance for the purpose of securing the government's help in producing witnesses, when the first indication that petitioner desired such witnesses came after the completion of the government's case at a trial commencing almost seven months after petitioner's arrest.

2. Whether the trial court properly denied petitioner's request, after the government had completed its case against him, to discharge counsel for the purported reason that counsel had not been able to produce witnesses whose presence petitioner desired.

3. Whether there was probable cause for petitioner's arrest.

STATEMENT

An indictment returned in the United States District Court for the Northern District of California charged petitioner and one John Henry Martinez in two counts with the sale of one pound of marihuana and with the concealment of five pounds of marihuana, in violation of 21 U.S.C. 176(a). Petitioner went to trial alone before a jury and was found guilty.[1] He was sentenced to imprisonment for five years on each count, the terms to run concurrently.

[1] Martinez entered a plea of guilty to these charges in other proceedings.

1. At the beginning of trial on November 8, 1960, the Assistant United States Attorney informed the jury in his opening statement that the government's witnesses would be a chemist, two agents of the Federal Bureau of Narcotics and one agent from the Customs Service (Tr. 4-5). The testimony of these witnesses developed the following facts:

The narcotics agents had received information from the Customs Service that large amounts of marihuana were being smuggled into San Francisco from Mexico. The Service was using an informer by the name of Raoul Miller who could make a purchase of this marihuana from an Elroy Jones. It was believed that some of the marihuana would be hidden at 383-A South Van Ness Avenue. With this information, the agents acted with local police to place the described premises (then rented to a Mrs. Fultz) under surveillance on April 25, 1960 (Tr. 92). Earlier on the same evening agents had searched the person and automobile of Raoul Miller, given him four twenty-dollar bills, the serial numbers of which had been recorded, and followed him to the vicinity of the premises under surveillance (Tr. 23-24).

At about 7:20 p.m., petitioner in one car and Martinez and an unidentified man in another car parked in front of the premises and, after a short conversation, entered the apartment. Martinez was carrying a large brown paper sack (Tr. 44-45, 59-60).

A short time later Elroy Jones arrived and entered the premises. He came out about five minutes later, crossed the street and stood until he was joined

by Miller, the informer. The two men had a conversation and then separated. Jones reentered the apartment. A few minutes later he came out again, carrying a brown package, and rejoined Miller in Miller's car. In a minute or two Jones alighted from the car and Miller drove off (Tr. 47-48; 83).

Jones, leaving Miller, walked toward a grocery store. Martinez and the unidentified male left the apartment and entered a corner bar. Petitioner also came out of the apartment with two small children and walked toward the grocery store. Shortly thereafter, petitioner, Jones and the children were seen walking back toward the apartment with petitioner carrying a bag of groceries. Petitioner and the children entered the apartment and Jones left the scene (Tr. 48-49; 84).

At this point, the surveillants received a radio transmission from fellow officers that the special employee Miller had, a short distance away, turned over a package of marihuana to them (Tr. 48-49, 84).

Thereupon the surveillants approached the entrance to the apartment. They knocked on the door, announced that they were federal narcotics agents and that they wanted to talk. There was no response, but voices could be heard inside. One agent turned the latch to the door and it opened. Petitioner, another person and Mrs. Fultz were in the kitchen. The agents arrested petitioner and found on his person the four marked bills which they had given to Miller. In the bedroom they found on the bed several squares of brick-type marihuana. Petitioner said he was holding the money for another. He said he lived in the apartment (Tr. 50-80; 84-88). Later at the

Bureau of Narcotics petitioner told one agent that the marihuana belonged to Martinez who left it at his house to sell (Tr. 88).

2. On cross-examination of one of the agents, defense counsel inquired about the pleas of Martinez and Jones. In answer to counsel's inquiry, the agent denied that Martinez and Jones had made statements exonerating petitioner (Tr. 101-102).

The day after the government had rested its case, the defense moved orally for a continuance (outside the presence of the jury) "for the reason that the prosecution has failed to bring in either Mr. Martinez or Mr. Elroy Jones, both of whom—whose whereabouts are known to them but unknown to us" [2] (Tr. 107-108). Government counsel opposed the motion on the ground that this first request for the government's help in producing the witnesses was untimely (Tr. 108-109). The court denied the motion (Tr. 109).

Thereupon petitioner announced that he wished to discharge his attorney saying, "She won't cooperate with me * * *," and, "She hasn't been able to bring up these witnesses." Petitioner said that Martinez "that had this marihuana" and Jones "who gave me the money" were vital to his defense. He said he would hire another attorney. The court reminded petitioner that the government's case was in. Noting that this was "the oldest game in the book with

[2] It appears that Jones at the time was on probation in connection with this offense and that this was known to counsel (Tr. 101). Martinez, who had entered a plea of guilty to a state charge, was in San Quentin prison.

respect to delaying cases," the judge said he would not allow petitioner's attorney to withdraw in the middle of the case. Petitioner replied, "Well, I discharge her." Asked how he would conduct his case, petitioner said, "I will make the attempt to bring these witnesses in." Reminded that the court had denied a continuance and that the case was going ahead, petitioner moved for a mistrial. The court denied the motion and refused permission for the withdrawal of counsel. The defense proceeded, with petitioner and Mrs. Fultz taking the stand (Tr. 109 *et seq.*).[3]

ARGUMENT

1. The court below properly held that the trial judge did not abuse its discretion in denying petitioner's motion for a continuance for the purpose of producing Martinez and Jones. See *Isaacs* v. *United States*, 159 U.S. 487. The record negates petitioner's contention that he was surprised by the failure of the government to produce the two men. At the outset of the trial, government counsel announced the identity of his witnesses and exactly what his proof would show. Neither Martinez nor Jones was named as a witness. It was apparent then, as it was throughout the government's development of its case, that neither individual was required to prove the government's case and that therefore the government

[3] The colloquy which took place at this time is recited in full in footnote 8 of the opinion of the court of appeals (see Pet. App. vi-ix).

did not need to call, or contemplate calling them.[4] Yet the defense gave no indication at all that it desired the production of these witnesses until after the completion of the government's case.

Moreover, petitioner did not say then what if anything these witnesses could have contributed to his defense. He did not support his motion for a continuance by affidavit showing the nature of the expected testimony as required by the district court rules,[5] nor did he supply this omission by an oral statement showing the nature of the testimony. Almost seven months had elapsed between the date of petitioner's arrest and the beginning of trial. It is reasonable to assume that, if petitioner had a bona fide desire to use these witnesses, some inquiry would have been made of government counsel prior to this time. There was no occasion for the district court to delay and disrupt the trial proceedings at this point for the requested continuance.

2. The same considerations of orderly trial procedure justified the district court's exercise of discre-

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[4] In her summation to the jury, defense counsel commented at length upon the failure of the government to bring in these witnesses and the informer (Tr. 185, 191). It does not appear that she asked for special instructions on the subject (Tr. 178).

[5] Rule 13(b), Rules of Practice, United States District Court, Northern District of California, provides in pertinent part: "A motion to postpone or continue a trial on the grounds of absence of a witness or evidence shall be made upon affidavit showing the nature and materiality of the expected testimony or evidence, and that diligent effort has been made to secure the witness or the evidence."

tion in denying petitioner's request to dismiss his counsel in the middle of trial. The request came after the government had concluded its case—a strong one—against petitioner. Petitioner asserted no good reason for the demand. He explained merely that counsel had not been able to bring in the witnesses Martinez and Jones, a matter with respect to which the court had previously denied a continuance. When asked how he would conduct the case without counsel he could only say that he would make the attempt to bring in these witnesses.

Whatever may be the considerations where an unequivocal, intelligently made request to proceed *pro se* is made in advance of trial with no indication that it is an obstructive stratagem,* those considerations are not pertinent here. There is no absolute right to discharge counsel *after the trial has begun.* To secure the reversal of a conviction because the trial judge denied a motion to discharge counsel there must be a showing that the defendant was prejudiced by the denial. *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 940 (C.A. 2), certiorari denied, 360 U.S. 937; *United States* v. *Mitchell*, 138 F. 2d 831 (C.A. 2), certiorari denied, 321 U.S. 794. An accused's right to represent himself is not so absolute that it must be recognized when to do so would disrupt the court's business. *United States* v. *Private Brands*, 250 F. 2d 554 (C.A. 2), certiorari de-

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*See *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279; compare *Brown* v. *United States*, 264 F. 2d 363 (C.A. D.C.), certiorari denied, 360 U.S. 911, and *Reynolds* v. *United States*, 267 F. 2d 235 (C.A. 9).

nied, 355 U.S. 957; *United States* v. *Foster*, 9 F.R.D. 367, 372 (S.D.N.Y.). Since a change in counsel or even a discharge will usually point to a continuance, it "should be had only when it is clearly necessary to safeguard the rights of an accused, when, indeed, the necessity of that safeguarding under the circumstances which have developed in a particular case outweighs the prejudice to the prosecution." *United States* v. *Mitchell*, 137 F. 2d 1006, 1011 (C.A. 2). Without adequate cause shown for a request to discharge counsel, the denial is not error. *United States* v. *Paccione*, 224 F. 2d 801, 802 (C.A. 2); *United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2), affirmed on other grounds, 341 U.S. 494; *United States* v. *Mitchell*, *supra*, 137 F. 2d 1006 (C.A. 2). See also generally *Brown* v. *United States*, *supra*, 264 F. 2d 363 (C.A.D.C.), certiorari denied, 360 U.S. 911; *Egan* v. *Tects*, 251 F. 2d 571 (C.A. 9); *Duke* v. *United States*, 255 F. 2d 721 (C.A. 9), certiorari denied, 357 U.S. 920.

Petitioner went to trial with counsel and expressed no dissatisfaction at all until after the government's case had been proved against him. As noted above, he gave no adequate reason for desiring to discharge counsel. After his request was denied he took the stand and under examination by counsel told his story of being innocently involved in the charged offense by reason of his presence at a friend's house. Counsel thereafter made an able argument to the jury in his behalf. The district did not err in refusing to permit petitioner to conduct his own defense.

3. Petitioner recognizes that, since his first challenge to the legality of his arrest and search was made in the court of appeals below, the court could have refused to consider the issue. See *Billeci* v. *United States*, 290 F. 2d 628 (C.A. 9). See also *Campbell* v. *United States*, 297 F. 2d 526 (C.A. 9), certiorari denied, 369 U.S. 825. He argues, however, that the court of appeals, which did examine the record in response to his request that it exercise its discretion under Rule 52(b) to notice plain errors affecting substantial rights, improperly concluded that there was no merit to his contentions.

The court below was correct in holding that there was no error, much less one affecting substantial rights, in the admission into evidence of the marihuana and marked money. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. *Wong Sun* v. *United States*, 371 U.S. 471, 479. Here the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were "sufficient in themselves to warrant a man of reasonable caution in the belief that" a narcotics offense had been or was being committed. See *Carroll* v. *United States*, 267 U.S. 132, 162; see also 26 U.S.C. 7607. The officers had information from a reliable source that a part of a large shipment of marihuana was believed to be hidden at the South Van Ness Avenue apartment and that a named informer could make a purchase of the marihuana through a named intermediary. They observed the intermediary enter the apartment, emerge with a

package and meet the informer under circumstances which gave them every reason to believe that a sale had taken place. That a transfer had in fact taken place was confirmed by information radioed to them. In the meantime, petitioner had been observed following a pattern of conduct that would indicate a proprietary interest in the apartment. He had also been seen meeting the intermediary immediately after the transfer. There was thus probable cause for his arrest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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